

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-2067

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2067

MICHAEL H. BROWN,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

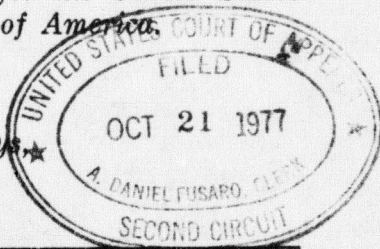
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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Docket No. 77-2067

MICHAEL H. BROWN,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael H. Brown appeals from two orders entered in the United States District Court for the Southern District of New York, on December 15, 1976 and April 22, 1977, by the Honorable Lawrence W. Pierce, United States District Judge, denying without a hearing his motion pursuant to Title 28, United States Code, Section 2255, to vacate the judgment of conviction entered on January 7, 1976.

Indictment 74 Cr. 1068, filed November 14, 1974, charged Brown in Count Two with attempting to assault foreign officials and official guests at the headquarters of the United Nations by the use of a dangerous weapon, in violation of Title 18, United States Code, Section 112(a). Count Three charged Brown with attempting to destroy property within the United States used by an inter-

national organization, in violation of Title 18, United States Code, Section 980. Count Four charged him with interstate transportation of an explosive in violation of Title 18, United States Code, Section 844(d). Count One charged Brown with conspiracy to commit the crimes charged in Counts Two through Four.*

Trial commenced against Brown on November 25, 1974, before Judge Pierce and a jury, and concluded on December 2, 1974, when the jury convicted Brown on Counts Two through Four and acquitted him on Count One.

On January 15, 1975, Judge Pierce sentenced Brown to consecutive terms of ten years' imprisonment on each of Counts Two and Four, and five years imprisonment on Count Three. The District Court committed Brown to the Bureau of Prisons for a study pursuant to the provisions of Title 18, United States Code, Section 4208(c). After Judge Pierce received the results of the Bureau of Prisons study, he resentenced Brown on April 17, 1975 to concurrent terms of ten, five, and ten years' imprisonment on Counts Two, Three, and Four, respectively. The trial judge also directed, pursuant to Title 18, United States Code, Section 4208(a)(2), that Brown be eligible for parole at a time determined by the Board of Parole.

On November 21, 1975, this Court reversed Brown's conviction on Count Two and affirmed his convictions on Counts Three and Four.** The Court also remanded Counts Three and Four for resentencing in light of the

* This indictment superseded Indictment 74 Cr. 853, which had been filed on September 6, 1974, and which charged Brown with the same crimes set forth in Counts One through Three of the superseding indictment.

** The Government confessed error with respect to Brown's conviction on Count Two.

reversal of Brown's conviction on Count Two. *United States v. Brown*, 535 F.2d 1243 (2d Cir. 1975) (Memorandum).

On January 7, 1976, Judge Pierce resentenced Brown to concurrent terms of five years' imprisonment on Counts Three and Four. Brown is presently serving that sentence.

On November 9, 1976, Brown filed a motion to vacate the judgment of conviction, pursuant to Title 28, United States Code, Section 2255.* On December 15, 1976, Judge Pierce filed on memorandum opinion dismissing seven of the ten claims made in the motion without requiring response from the Government. (A. 1a-3a).** In the opinion the District Court also directed the Government to respond to the remaining three claims. The Government's response was filed on January 14, 1977, and on April 22, 1977, Judge Pierce filed a second memorandum opinion dismissing the remaining claims. (A. 4a-7a).

Statement of Facts

The Government's proof at trial established that on August 6, 1974, Brown placed five sticks of dynamite with an attached fuse in the Meditation Room of the United Nations headquarters in New York City.*** The dynamite, undetonated, was found by a guard at the United Nations on the following morning, August 7, 1974. The fuse was found attached to a book of matches, upon which was placed a partially burned cigarette. (Tr. 45-50).****

* The motion bears District Court docket number 76 Civ. 4980.

** "A." refers to the Government's appendix.

*** A more comprehensive statement of facts can be found in the Government's brief on Brown's direct appeal, at pp. 2-7, to which we respectfully refer the Court. *United States v. Brown*, Docket No. 75-1307.

**** "Tr." refers to the trial transcript.

The evidence connecting Brown to the planting of the dynamite was overwhelming. A latent fingerprint on the tape which tied the sticks of dynamite together was identified as Brown's. (Tr. 390-399). The records of the Hotel Commodore in New York City reflected that a Michael Brown registered on August 5, 1974 and checked out the next morning. The handwriting on the registration card was identified as Brown's. (Tr. 227-231, 378-388). The telephone records for Brown's home telephone in Berea, Kentucky showed a series of collect calls to Berea from August 3 through 6, 1974 which traced a route from Falls Church, Virginia through New York City to Darien, Connecticut. (Tr. 216-226). The dynamite belonged to a lot manufactured in Alabama, 90% of which was shipped to Kentucky, Brown's home state. (Tr. 191-198).

The Government also presented testimony from Larry and William Stafford, residents of Lexington, Kentucky, who had extensive conversations with Brown in July, 1974. Brown told the brothers that he was planning to destroy a "pagan altar" located in the United Nations headquarters in New York City and that he was considering various means of destruction, including dynamite and thermite. (Tr. 133-151, 174-185).

The Government also proved that at the time of Brown's arrest and arraignment on September, 1974, he made certain statements to the F.B.I. agents who arrested him. While mentioning certain documents kept in his home, he stated, "If they find the scrapbook, I'm dead. There is enough there to convict me whether or not I did it." (Tr. 291). A later search of Brown's home pursuant to a search warrant disclosed, *inter alia*, a scrapbook containing newspaper articles concerning the discovery of dynamite at the United Nations on August 7, 1974. (Tr. 357-360). After his arraignment, Brown also stated: "It just goes to show you can't make a move against the Commies in New York City and expect to get away with it." (Tr. 292).

ARGUMENT

POINT I

The Defect In Count Two Of The Indictment Did Not Taint Brown's Conviction On Counts Three And Four.*

Brown claims that his convictions on Counts Three and Four were tainted because the jury also was required to pass upon the charges contained in Count Two, which was later found to be defective. Count Two charged Brown with attempting to assault foreign officials and official guests at the United Nations by means of a dangerous weapon, in violation of 18 U.S.C. § 112(a). On direct appeal, Brown argued that his conviction on that count could not stand because § 112(a) did not proscribe an "attempted" assault. The Government confessed error with respect to Count Two and this Court accordingly vacated the conviction and dismissed the count. The convictions on Counts Three and Four were affirmed, but were vacated and remanded for resentencing in light of the reversal of Count Two. Brown now claims that the presence of a defective count in the indictment tainted his convictions on Counts Three and Four.

This Court has recognized the possibility that a conviction on counts later found invalid could taint a con-

* The order of argument in the Government's brief follows that of Brown's brief. Brown's brief frequently incorporates by reference arguments made in his § 2255 motion in the District Court, and arguments presented there will be addressed in the Government's brief where appropriate.

viction on valid counts to such an extent that a new trial would be required. *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *United States v. Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970); *United States ex rel. Weems v. Follette*, 414 F.2d 417 (2d Cir. 1969), *cert. denied*, 397 U.S. 950 (1970). However, the facts of this case hardly entitle Brown to such drastic relief. The proof at trial concerned only one criminal act, the placing of dynamite in the United Nations; this act was alleged in the indictment to have violated four criminal statutes. Accordingly, the inclusion of Count Two, alleging a violation of 18 U.S.C. § 112(a), did not permit the introduction of any proof that could not have been adduced upon the trial of the remaining counts. Thus, there simply was no additional evidence the "spill over" effect of which might have prejudiced the jury's consideration of Brown's guilt on the remaining counts. See *United States v. Adcock*, *supra*, 447 F.2d at 1339.

By contrast this Court has declined to vacate valid convictions in other cases where there was far more potential prejudice to the defendant than in the instant situation. Thus, for example, in *United States v. Febre*, *supra*, even though the defective counts charged discrete criminal transactions the convictions on the valid counts were not vacated. The same result was reached in *Weems*, *supra*, where the defendant had been convicted of three separate armed robberies. This Court concluded there that even if conviction on one of the three counts was tainted, it could not have affected the defendant's conviction for the other two robberies. 414 F.2d at 420-421. If the reversal of defective counts charging discrete criminal acts does not warrant a new trial on remaining valid counts, surely the same result must follow in this case, which involved only a single criminal transaction. Indeed, this Court has noted that it was only a "rare occasion" when a conviction on valid counts would be reversed because of the existence of defective counts in

an indictment.* *United States ex rel. Weems v. Follette, supra*, 414 F.2d at 419. Nothing in this case suggests that Brown is required to receive such relief.

The only relief to which Brown was entitled was that which he has already obtained on the direct appeal: the vacating of the sentences on Counts Three and Four and a remand for resentencing. Obviously if the Court had determined that the more drastic remedy of reversing the valid convictions was warranted, as it was in *United States v. Barash*, 365 F.2d 395 (2d Cir. 1966), it would have so ordered on the direct appeal. There is no reason why that remedy, once rejected, should now be adopted.

* The "rare occasion" was *United States v. Barash*, 365 F.2d 395 (2d Cir. 1966), the only case we have discovered in which valid convictions were reversed because of the existence of invalid counts. *Barash*, however, was an extreme situation: the defendant had been convicted on 26 counts, including 13 counts charging bribery of a public official. This Court reversed his conviction on 24 of the 26 counts, which left only two counts charging the aiding and abetting of payments of \$25 each. This Court concluded that the overwhelming and substantial proof on the reversed counts could well have tended to prejudice the jury's consideration on the minor counts on which the defendant's conviction was valid. It therefore reversed those counts as well and remanded for a new trial. The facts of this case obviously do not even remotely resemble those of *Barash*; reversal of valid counts in such a situation should, we submit, remain a "rarity" in this Circuit.

POINT II

The Opening Of Brown's Mail By Prison Authorities Did Not Prejudice Him And Cannot Be The Subject Of A § 2255 Motion.

Shortly after the original indictment was filed against Brown on September 6, 1974, he was arrested in Kentucky by agents of the Federal Bureau of Investigation. Before his removal to the Southern District of New York, Brown was lodged in the Fayette County Jail, Lexington, Kentucky. Brown claims that during his incarceration there his mail was "delivered . . . to the F.B.I." and thereafter used against him at trial. This claim may not properly be raised in a motion pursuant to 28 U.S.C. § 2255. Moreover, even assuming *arguendo* that the contention is properly raised by Brown's motion, there was no impropriety in the opening of Brown's mail. Finally, no information gleaned thereby was used against him at trial.

First, although Brown claims that the mail opening practice was a violation of the Eighth Amendment, that contention is plainly frivolous. See *Sostre v. McGinnis*, 442 F.2d 178, 199-201 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). If this practice ran afoul of any constitutional provision—and we maintain it did not—it would have been of the Fourth Amendment's prohibition against unreasonable search and seizures. In *Stone v. Powell*, 428 U.S. 465 (1976) the Supreme Court held that claimed violations of the Fourth Amendment may not be raised in petitions for habeas corpus by state prisoners, "where the state has provided an opportunity for full and fair litigation" of such claims, 428 U.S. at 482. See also *Gates v. Henderson*, Dkt. No. 76-2065, slip op. 5361, 5372-74 (2d Cir., August 19, 1977) (*en banc*); *Pulver v. Cunningham*, Dkt. No. 76-2133, slip op. 5983 (2d Cir., Sept. 16, 1977). Although the *Stone* decision was limited to petitions filed by state prisoners, its underlying reason-

ing is equally applicable to the petitions of those in federal custody.* Because Brown had the opportunity to raise this claim at trial and did not, his failure to do so precludes its consideration in a proceeding for collateral relief.

Alternatively, even if this Court does not extend *Stone* to federal habeas corpus petitions, there is ample support for Judge Pierce's conclusion that Brown "deliberately bypassed" this issue at trial. The trial judge held that "Brown was aware of this alleged search and seizure and . . . he chose not to raise the issue at trial or on his direct appeal." (A. 5a). Judge Pierce thus properly found that there had been a "deliberate bypass" within the meaning of *Williams v. United States*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 1060 (1972) and that Brown was foreclosed from raising the point in a collateral attack on his conviction. *See also United States v. West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974), and cases cited therein. *Cf. Kaufman v. United States*, 394 U.S. 217, 227 n.8 (1969).

Second, even if the claim is properly raised here, it is plainly meritless. Brown failed to establish that there was anything improper in the opening of his mail by officials of the Fayette County Jail. It is well established that prison officials may open and read both incoming and outgoing correspondence and may also check letters for contraband. *Procunier v. Martinez*, 416 U.S. 396 (1974); *Wright v. McMann*, 460 F.2d 126, 131-132 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); *Sostre v. McGinnis*, 442 F.2d 178, 199-201 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

* Justice Brennan, in dissent in *Stone v. Powell*, plainly concluded that the decision was also applicable to federal habeas corpus petitions: "Although the Court does not expressly overrule *Kaufman v. United States*, 394 U.S. 217 (1969), and its progeny involving collateral review of Fourth Amendment claims of federal prisoners . . . *Kaufman* obviously does not survive." 428 U.S. at 519, n.14.

Finally, the Government's submission to Judge Pierce demonstrated conclusively that none of the letters, and no information gleaned from these letters, was used against Brown at trial. The Government submitted to the trial judge an affidavit from one of the prosecutors who participated in Brown's trial. The affidavit stated that none of the F.B.I. agents assigned to the investigation of Brown in Kentucky ever received either an original or copy of any letter written to or by Brown from any official of the Fayette County Jail. The affidavit further recited that one Connie Taylor, an employee of the jail, had stated in an interview that Brown's outgoing mail was not opened and his incoming mail checked only for contraband.* The affidavit also contained representations from the two Assistant United States Attorneys who prosecuted the case that they had never seen any of Brown's correspondence from the Fayette County Jail and that they never had discussed any such correspondence with any agent of the F.B.I. Upon this showing, Judge Pierce correctly concluded that "the affidavit of the prosecutor establishes that no letters were ever employed at the trial of this action." Since Brown's moving papers contained no more than conclusory speculation, the District Court was fully justified in denying this motion without a hearing. *Silverman v. United States*, 556 F.2d 655, 659 (2d Cir. 1977); *United States v. Franzese*, 525 F.2d 27 (2d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976); *Romano v. United States*, 516 F.2d 768, 771 (2d Cir.), *cert. denied*, 423 U.S. 994 (1975); *Dalli v. United States*, 491 F.2d 758 (2d Cir. 1974).

* In addition, the affidavit stated that the only information about Brown given the F.B.I. by Ms. Taylor was that he had expressed interest in disseminating news of his plight to right wing newspapers. Even if one assumes *arguendo* that Ms. Taylor obtained that information from an examination of Brown's mail, he was not thereby prejudiced, for that information was never used against Brown at trial and was not even mentioned during the presentation of the Government's case.

POINT III

The Grand Jury And The Petit Jury Were Properly Constituted.

Brown argues that the grand jury that indicted him and the trial jury that convicted him failed to represent a cross section of the community because convicted felons and those residing in the district less than a year were excluded from service. In the first instance, Brown's failure to have raised either of these issues prior to trial amounts to a waiver. Fed. R. Crim. P. 12(b); *Davis v. United States*, 411 U.S. 233 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 361-64 (1963). The claims are without substance in any event.

Individuals in the two categories complained of are excluded both by the terms of the Jury Selection and Service Act of 1968, see 28 U.S.C. §§ 1865(b)(1) and (5), and by Article VI of the Jury Selection Plan of the United States District Court for the Southern District of New York. It is well settled that classifications in federal statutes will be found unconstitutional only if they are arbitrary or otherwise "so unjustifiable as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The exclusions Brown challenges have been frequently scrutinized, and no court has found in them any constitutional infirmity. The one year residence requirement has been upheld because it "assures some substantial nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect." S. Rep. No. 891, 90th Congress, 1st Session, quoted in *United States v. Arnett*, 342 F. Supp. 1255, 1261 (D. Mass. 1970) (Wyzanski, J.). See *United States v. Owen*, 492 F.2d 1100, 1109 (5th Cir.), cert. denied, 419 U.S. 965 (1974); *United States v. Perry*, 480 F.2d 147, 148 (5th Cir. 1973); *United States v. Ross*, 468

F.2d 1213, 1215-1216 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Duncan*, 456 F.2d 1401, 1406 (9th Cir.), *vacated and remanded on other grounds*, 409 U.S. 814 (1972); *United States v. Armsbury*, 408 F. Supp. 1130, 1134 (D. Ore. 1976); *United States v. Grey*, 355 F. Supp. 529, 533 (W.D. Okla. 1973). Similarly, the exclusion of convicted felons has been deemed proper because it is designed to "assure probity in the rendering of jury service." *United States v. Armsbury*, *supra*, 408 F. Supp. at 1134. See also *United States v. Arnett*, *supra*, 342 F. Supp. at 1261. Judge Pierce's dismissal of the jury selection claims, therefore, was fully justified.

POINT IV

Brown Was Not Denied The Use Of Compulsory Process To Obtain Witnesses.

Brown claims that he was denied the use of compulsory process to obtain witnesses in his behalf. This claim is simply incorrect; the benefits of Rule 17(a) of the Federal Rules of Criminal Procedure at all times were available to him. Further, had he claimed indigency, Brown would have been entitled to subpoena witnesses at no cost pursuant to Rule 17(b). Brown also claims a deprivation of compulsory process because his attorney refused to employ an investigator or to call expert witnesses. How this constitutes a denial of compulsory process is nowhere explained. As Judge Pierce observed, Brown's real claim here is ineffective assistance of counsel. (A. 1a). As we discuss more fully at Point X, *infra*, Judge Pierce correctly concluded that the representation provided Brown was adequate.

POINT V

Brown Was Not Deprived Of The Right To Represent Himself.

Relying on *Faretta v. California*, 422 U.S. 806 (1975), Brown claims that he was denied the right to represent himself and that he was therefore "excluded" from the proceedings. The record discloses, however, that Brown at all times during the trial was represented by retained counsel, Arthur Hanes, Jr., and that Brown was present at all critical stages of the trial. Judge Pierce merely refused to permit Brown to act as co-counsel on his own behalf, a decision well within the trial judge's discretion. (Tr. 2-3). As this Court stated in *United States v. Wolfish*, 525 F.2d 457, 463, n.2 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976), "[t]here is nothing in *Faretta* or in any statute which suggests that a defendant may *both* have an attorney and represent himself." (Italics in original). See also *United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir. 1977); *Legal Aid Society v. Herlands*, 399 F.2d 343, 347 (2d Cir. 1968), *cert. denied*, 393 U.S. 1033 (1969); *United States v. Williams*, 534 F.2d 119 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); *United States v. Swinton*, 400 F. Supp. 805 (S.D.N.Y. 1975). Brown never sought to discharge his counsel or to act exclusively as his own lawyer. Judge Pierce thus acted properly in refusing to entertain *pro se* motions from Brown during the trial and in denying him the status of co-counsel.

POINT VI

The Absence Of A Written Opinion By This Court On Brown's Direct Appeal Was Not A Denial Of Due Process.

Brown claims to have been denied due process of law because this Court issued no written opinion in deciding his direct appeal. Instead, the Court delivered its opinion from the bench at the oral argument of the appeal and restated its reasons succinctly in the summary order reversing Brown's conviction on one count, while affirming those on two others. This practice is wholly in accord with local rule 0.23 of the United States Court of Appeals for the Second Circuit, which provides that "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order." See generally *United States v. Joly*, 493 F.2d 672 (2d Cir. 1974).

In disposing of Brown's claim in the District Court, Judge Pierce observed that "[t]here is no constitutional right to a full-blown opinion upon appellate review." (A. 2a). Although this Court never has been required to pass upon the constitutionality of what is now a well-established practice, similar questions have been raised in other Circuits which have also adopted procedures for disposing of cases summarily. Two Circuits now have held that the disposition of appeals without oral argument is not violative of due process, and rejection of Brown's constitutional claim follows *a fortiori* from those decisions. *George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co. Inc.*, 502 F.2d 1045, 1050-1051 (5th Cir. 1974); *National Labor Relations Board v. Local No. 42, International Association of Heat and Frost Insulators and Asbestos Workers*, 476 F.2d 275 (3rd Cir. 1973) (*en banc*). More-

over, Brown cannot claim that the Court rendered no opinion in deciding his appeal, because an oral opinion was given. His only complaint, then, is that this oral opinion was not reduced to writing and published. We are unaware of any construction of the Fifth Amendment which imposes a requirement of written and published opinions. The Court did articulate its reasons for deciding the appeal, and Brown obviously was entitled to no more.*

POINT VII

The Filing Of A Superseding Indictment Did Not Deny Brown Adequate Notice Of The Charges Against Him.

Brown claims that the filing of a superseding indictment eleven days before the trial began deprived him of adequate time to prepare a defense against the new charges contained in that indictment. This claim is baseless. The first indictment returned against Brown, 74 Cr. 853, was filed September 6, 1974 and charged him in three counts with violations of 18 U.S.C. §§ 371, 112(a), and 970. The superseding indictment, filed November 14, 1974,** embodied the three charges contained in the first indictment and added a fourth count charging a violation of 18 U.S.C. § 844(d) that was based upon the same underlying facts as the other counts.

As Judge Pierce noted in rejecting Brown's belated claim, "indictments are commonly superseded on the day

* As the Fifth Circuit observed in *Bryson, supra*, "due process of law has never been a term of fixed and invariable content." 502 F.2d at 1050. See *F.C.C. v WJR, the Goodwill Station, Inc.*, 337 U.S. 265, 275 (1949). The concept obviously has sufficient flexibility to permit this Court—and others—to dispose of its cases expeditiously.

** Trial began on November 25, 1974.

of trial," (A. 2a) and it is widely recognized that "a superseding indictment may be returned at any time before a trial on the merits." *United States v. White*, 524 F.2d 1249, 1253 (5th Cir. 1975), *cert. denied*, 426 U.S. 922 (1976).^{*} Such a procedure, then, is hardly irregular; the only question is whether it deprived Brown of adequate notice of the charges against him.

There is no merit whatever to Brown's claim that he was prejudiced by the inclusion of a fourth count in the new indictment. Brown was arraigned on the new indictment before the trial began, and neither he nor his lawyer made any objection to going forward on the second indictment. Brown's counsel, Arthur Hanes, did state (Tr. 4) that he had seen the new indictment for the first time on November 24, 1974. Judge Pierce then asked counsel whether he desired any further discovery concerning the new matter appearing in the second indictment (Tr. 5-6), and indicated that if further discovery was requested, counsel would be given sufficient time before the beginning of trial to obtain it. (Tr. 6). Hanes thereupon demanded a list of the Government's witnesses and the opportunity to inspect all documents the Government intended to offer in evidence. In response, the prosecutor pointed out that discovery demands of this breadth had not even been made with regard to the original indictment. Judge Pierce ruled that Brown was not entitled to a list of witnesses or to disclosure of all of the Government's evidence, and denied the discovery motion. The trial judge then asked Brown's counsel if he had any further requests, and Hanes requested that the trial begin. (Tr. 7). Later the prose-

^{*} A recent example can be found in *United States v. Ricard*, Dkt. No. 77-1109, slip op. 6015, 6016 (2d Cir., Sept. 16, 1977), where the superseding indictment, which added a felony count to what had previously been a misdemeanor information, was filed one week before trial.

cutor suggested that if Hanes claimed surprise at the introduction of evidence relating only to Count Four, he could make appropriate motions for an adjournment during the trial. (Tr. 11). Hanes agreed to this procedure (*Id.*) and no request for a continuance was made during the trial.

Thus, it is clear that at no time did Brown seek an adjournment in order to prepare a further defense against this new charge, nor did he claim prejudice from being taken to trial on the new indictment. The claim is now raised for the first time, two years after the trial concluded, and has therefore been waived. *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977); *United States v. Housand*, 550 F.2d 818, 825 (2d Cir. 1977); *United States v. Jacobson*, 547 F.2d 21 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1581 (1977).

Finally, Brown has failed to demonstrate what prejudice he suffered, and we submit that he suffered none. As Judge Pierce concluded in dismissing his argument, "[w]hile Count Four charged a new crime—interstate transportation of explosives—the charge derived from the same factual circumstances as did the previous counts." (A. 2a). All of the counts in the indictment, and all of the proof at trial, centered on a single incident: the planting of dynamite at the United Nations on August 6, 1974. The addition of Count Four did not suddenly interject a substantial amount of new and unanticipated evidence into the Government's case; it simply alleged that the conduct already ascribed to Brown in the first indictment violated another criminal statute.

POINT VIII

The Claim That Brown Received Inadequate Treatment In Prison Was Improperly Raised In The District Court.

Brown claims that during his term of incarceration he has not received the "correction and instruction" to which he is entitled under 18 U.S.C. §§ 4081-4082. This claim is not one that can be raised in a motion under 28 U.S.C. § 2255. "It is well settled that a motion to vacate sentence [pursuant to 28 U.S.C. § 2255] is available only to collaterally attack the validity or imposition of a sentence and that an attack upon the execution of sentence may only be made by means of habeas corpus or mandamus in the district of confinement." *McCune v. United States*, 374 F. Supp. 946, 949 (S.D.N.Y. 1974). See *United States v. DiRusso*, 535 F.2d 673 (1st Cir. 1976); *Lee v. United States*, 501 F.2d 494, 500 (8th Cir. 1974); *Robinson v. United States*, 474 F.2d 1085, 1091 (10th Cir. 1973); *Ridenour v. United States*, 446 F.2d 57 (9th Cir. 1971); *Mordecai v. United States*, 421 F.2d 1133 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 977 (1970).^{*} Whether

^{*} *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975), cited by Brown, appears to create an exception to this widely followed proposition. There, the movant, an orthodox rabbi, claimed that he had been denied access to kosher food. Judge Weinstein held that this claim could be raised in a § 2255 motion. Although Judge Weinstein acknowledged that a motion under this statute is available only to attack the denial of constitutional rights at the imposition of sentence and not those which arise upon its execution, 396 F. Supp. at 696, he held Kahane's claim cognizable under § 2255 "because it was obvious to the sentencing court at the time of sentencing that defendant's dietary requirements, if ignored, would create a serious constitutional issue." *Id.*

We submit that this jurisdictional point in *Kahane* was wrongly decided and should not be followed here. Despite the

[Footnote continued on following page]

or not Brown has received adequate instruction in prison is a question that has no bearing on the validity of the sentence he is serving. He was, therefore, obligated to raise the claim by means other than a § 2255 motion. Further, because Brown is incarcerated in Terre Haute, Indiana, venue for such a claim does not lie in the Southern District of New York. Judge Pierce thus properly dismissed this aspect of Brown's motion.

POINT IX

Brown's Conviction Was Not Based On Perjured Testimony.

In the District Court Brown argued that several Government witnesses, namely, Larry and William Stafford and F.B.I. agents James Glass and Edward Hino, committed perjury during the trial. Specifically, Brown claimed that the Stafford brothers lied when testifying that they had not been promised anything in exchange for their testimony,* and that the F.B.I. agents lied when relating certain post-arrest statements made by defendant.** Judge Pierce properly rejected this aspect of Brown's motion as insufficient on its face to constitute a claim of perjury under § 2255.

District Court's analysis, the failure to provide kosher food plainly was a defect in the execution of sentence, not in its imposition. Nevertheless, even if *Kahane* was decided correctly, it is distinguishable. The denial of kosher food and the consequent intrusion upon certain religious practices have clear constitutional implications. Here, however, it is difficult to perceive what constitutional rights were denied Brown by the failure of the Bureau of Prisons to provide him with adequate instruction. At most, the Bureau failed to adhere to certain statutory requirements.

* Tr. 147-149, 173, 185.

** Tr. 277-281, 286-292.

Before a conviction will be vacated because of the use of perjured testimony, the defendant must establish first, that the testimony of a Government witness was in fact perjurious, and second, that the prosecutor knew that the testimony was perjurious when it was offered. *Silverman v. United States*, *supra*, 556 F.2d at 658; *Hallman v. United States*, 490 F.2d 1088 (8th Cir. 1973); *McBride v. United States*, 446 F.2d 229 (10th Cir. 1971), *cert. denied*, 406 U.S. 977 (1972); *Derringer v. United States*, 441 F.2d 1140 (8th Cir. 1971); *Anderson v. United States*, 403 F.2d 451 (7th Cir. 1968), *cert. denied*, 394 U.S. 903 (1969); *Stein v. United States*, 390 F.2d 625 (9th Cir. 1968); *Enzor v. United States*, 296 F.2d 62 (5th Cir. 1961); *Smith v. United States*, 252 F.2d 369 (5th Cir. 1958). Brown's petition did not allege that this supposed perjury was known to the prosecution and was properly denied for this reason alone. *Silverman v. United States*, *supra*.

Furthermore, Brown's motion did not allege any facts sufficient to support his assertion that Government witnesses committed perjury. It is axiomatic that a motion under § 2255 in which perjury is alleged must set forth facts, and not mere legal conclusions. *United States v. Franzese*, *supra*; *Romano v. United States*, 460 F.2d 1198 (2d Cir.), *cert. denied*, 409 U.S. 915 (1972); *Bankston v. United States*, 433 F.2d 1294 (5th Cir. 1970); *Hammond v. United States*, 309 F.2d 935 (4th Cir. 1962); *United States v. Schultz*, 286 F.2d 753 (7th Cir. 1961); *United States v. Gonzalez*, 33 F.R.D. 280 (S.D.N.Y. 1960) (Kaufman, J.), *affd.*, 321 F.2d 638 (2d Cir. 1963). See also *Sanders v. United States*, 373 U.S. 1, 19 (1963). Brown's allegations of perjury fall far short of this standard.

The contentions concerning Messrs. Glass and Hino were little more than Brown's denials that he made the statements attributed to him. As Judge Pierce found, "[t]he barefaced denial of these statements by the peti-

tioner is not a sufficient factual showing to establish that the agent's statements were indeed perjurious." (A. 7a).

Nor are the claims with respect to the other witnesses on a stronger footing. At the time of the trial, the Stafford brothers were facing local criminal charges in Kentucky. Both testified that no promises had been made to them concerning these cases by any representative of the Government. Brown argues that this testimony was perjurious. The only factual support he offered in the District Court for this contention was a letter, purportedly from the police chief of Richmond, Kentucky, stating that the Staffords each received suspended sentences upon their convictions. This scarcely establishes that their testimony was perjurious. Brown has not alleged, or even suggested, that any promises were made to the Staffords, and his factual showing on this point was, therefore, totally inadequate to state a valid claim under § 2255.*

* Moreover, the testimony of the Staffords in this regard was subjected to cross examination by Brown's counsel, who suggested repeatedly by his questions (Tr. 153, 162-63, 188), and in his summation (Tr. 461-62, 464), that the Staffords were lying in order to gain lenient treatment in their pending case. A similar claim was made in *United States v. Pheribo*, 346 F.2d 559 (2d Cir. 1965), where a defendant also argued that a Government witness had falsely denied being promised lenient treatment in a pending criminal case. This Court noted that:

"[t]he very papers submitted by Pheribo clearly indicate that [the witness] was thoroughly cross examined at the trial, and his possible bias, prejudice or motive for testifying—stemming from expectations of leniency in sentencing—was fully brought home to the jurors. The credibility question thus amply presented must have been resolved adversely to Pheribo and may not, without more, be reopened on this motion." 346 F.2d at 560.

The Court, in affirming the denial of defendant's petition, also found that the record contained "not a scintilla of evidence that the Government promised [the witness] a more lenient sentence for testifying at Pheribo's trial." *Id.* The record in the present case contains no more evidence of such promises than did Pheribo's, and Brown's argument should, therefore, be rejected.

POINT X**Brown Received Adequate Representation At Trial.**

As a final matter, Brown claims that the representation by his counsel at trial was inadequate and denied him the right to counsel secured by the Sixth Amendment. Brown makes three specific complaints concerning his representation. First, he complains that of the two lawyers he retained, Arthur Hanes, Jr. and Edward Panzer, only Hanes appeared and represented him at trial. Second, he complains that Hanes abandoned him after his conviction and failed to prosecute the appeal. Third, he contends that neither of his lawyers adequately "pursued" his pre-trial motions. None of these claims comes close to establishing that Brown's representation was inadequate.

The absence of Mr. Panzer, Brown's second lawyer, was noted by Judge Pierce at the outset of the trial (Tr. 2). However, Mr. Hanes, the lawyer who was present, identified himself as Brown's trial counsel (*Id.*) and Brown voiced no objection to proceeding in Panzer's absence.* Cf. *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519 (2d Cir., June 30, 1977). Second, the claimed "abandonment" by Hanes after the trial was in no way prejudicial to Brown. As Judge Pierce observed in rejecting movant's contention, Brown was represented on appeal by a highly competent member of the appellate staff of the Legal Aid Society who did obtain the reversal of Brown's conviction on one of the three counts. Finally, Brown does not specify the nature of the pretrial motions that his lawyers failed to "pursue." The absence of such

* Indeed, as noted in Point V, *supra*, Brown appeared more anxious to establish himself as Hanes' co-counsel than to accord that status to Panzer.

specificity alone was sufficient to defeat his claim. In any event, Judge Pierce applied the recognized standard to Hanes's performance and concluded that his representation was not such as to render the trial a "farce and a mockery of justice" or to "shock the conscience of the Court." *United States v. Bubar*, *supra*, slip. op. at 4536 quoting *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976) and *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974).

Even the most cursory review of the trial record makes clear that Judge Pierce's conclusion was correct. The representation Hanes afforded Brown was entirely adequate even by a far more stringent standard. He obtained extensive pre-trial discovery (Tr. 10); cross-examined vigorously the Government's principal witnesses (Tr. 151-169), including the F.B.I. fingerprint expert (Tr. 399-408); and offered extensive argument in seeking to exclude certain portions of the Government's proof (Tr. 315-350).*

In sum, Judge Pierce properly found this claim to be devoid of merit and denied the motion pursuant to § 2255.

* Nor can it be claimed that Brown received inadequate representation because Hanes failed to move to suppress the contents of the letters Brown sent and received at the Fayette County Jail. As we have already demonstrated at Point II, *supra*, none of these letters was offered against Brown at trial, and indeed, none was ever seen by Government counsel. Hanes can thus scarcely be faulted for failing to move against proof that was never offered. See *Li Puma v. Commissioner*, Dkt. No. 77-2006, slip op. 4657, 4672 (2d Cir., July 11, 1977).

CONCLUSION

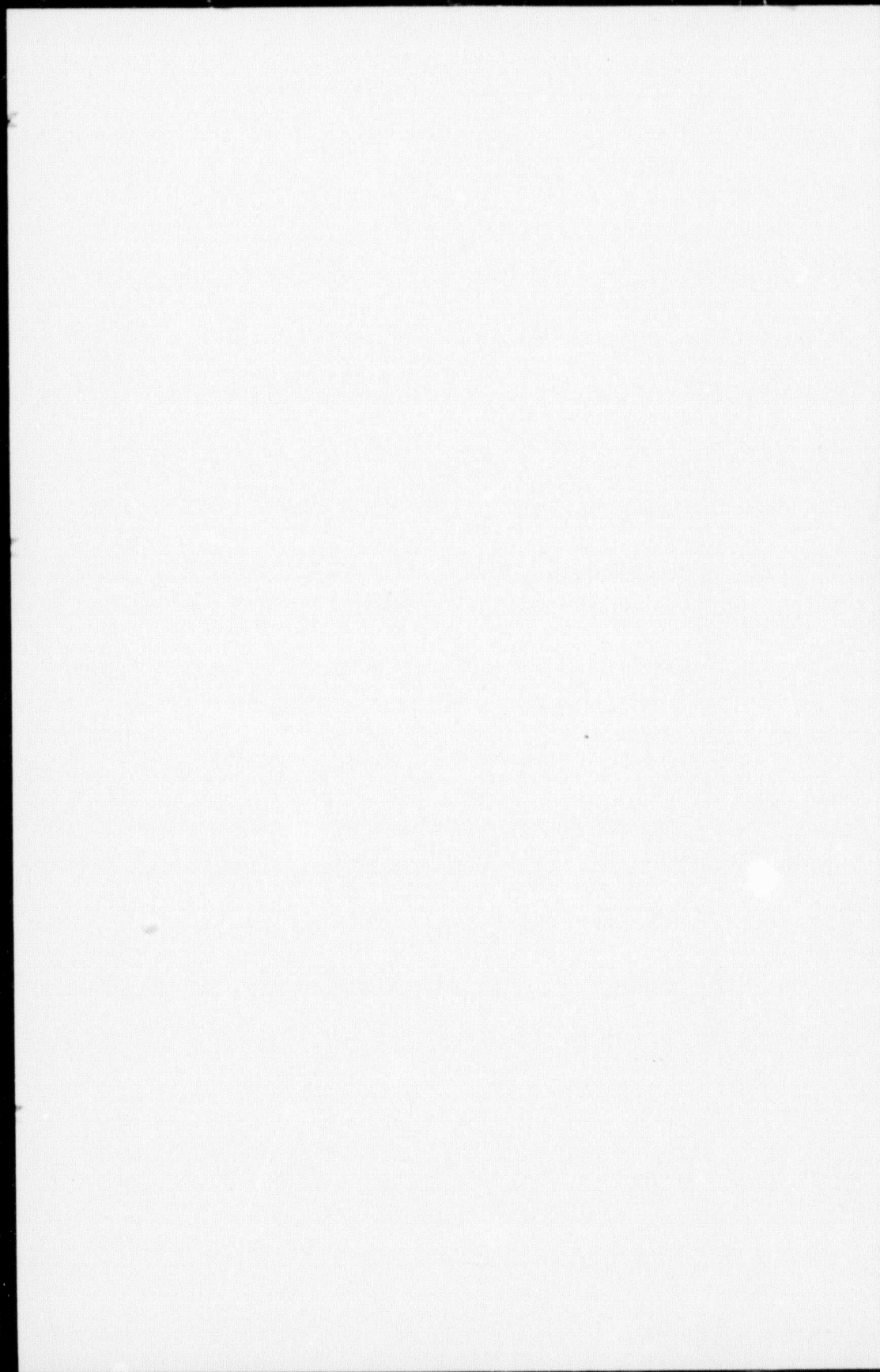
The orders of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JEREMY G. EPSTEIN,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

A P P E N D I X



Endorsement Order, Dated December 13, 1976

76 Civ. 4980, MICHAEL HALSEY BROWN v.
UNITED STATES OF AMERICA

By the attached papers, petitioner Brown seeks an order vacating his conviction, pursuant to 28 U.S.C. § 2255. Having reviewed the petition, the Court determines that seven of the ten claims raised herein should be summarily denied, and as to the remainder, the government should be directed to respond. Petitioner has itemized ten claims, and the Court will retain the same designations.

I. Petitioner can suffer no prejudice from the legal inadequacy of Count Two. The judgment of conviction as to Count Two was reversed and the charge dismissed. No defect in the indictment remains. Denied.

II. The government is directed to respond to this claim that petitioner's mail was opened and his letters used against him.

III. The government is directed to respond to this claim that the jury selection plan is unconstitutional because it excludes transients and felons.

IV. As to petitioner's claim that he was denied compulsory process, it is clear that he was afforded such a right. The specific claim here is that his attorneys failed to call certain witnesses or retain an investigator. This does not constitute a denial of compulsory process. Whether this constitutes inadequate assistance of counsel is addressed *infra*. Denied.

V. Contrary to the assertion, petitioner was not excluded from the proceedings: Brown was present at all times during the trial before the undersigned and a jury. The Court at that time properly refused to entertain *pro se* motions from the petitioner since he was represented by counsel. To the extent that petitioner's other

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claims rely upon *Faretta v. California*, 422 U.S. 806 (1975), the Court notes that *Faretta* was decided well after the trial herein, and under traditional legal doctrine the *Faretta* decision is not retroactive. Denied.

VI. There is no constitutional right to a full-blown opinion upon appellate review. Denied.

VII. The addition of Count Four on the day of trial through the filing of a superseding indictment was not, under the circumstances presented, a denial of the right to fair notice and time to prepare a defense. While Count Four charged a new crime—interstate transportation of explosives—the charge derived from the same factual circumstances as did the previous counts. Indictments are commonly superseded on the day of trial, and petitioner cites no authority which persuades this Court that what occurred herein was a denial of fair notice or due process. Denied.

VIII. The claims concerning the failure of the Bureau of Prisons to comply with their own policy guidelines are dismissed. See *Billiteri v. United States Board of Parole*, No. 75-6120 (2d Cir. August 30, 1976).

IX. The government is directed to respond to the petitioner's claim of perjured testimony.

X. This claim alleges inadequate assistance of counsel. Brown alleges that one of this two court-appointed lawyers failed to appear at trial. However, there is no right to two lawyers. Against trial counsel Hanes, petitioner alleges only that Hanes did not represent petitioner on appeal. However, petitioner was represented on appeal by Michael Young of the Legal Aid Society, a highly competent attorney who secured the reversal of the conviction on one count. Nor does petitioner have the right to select his court-appointed attorney on appeal; that re-

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sponsibility lies with the Circuit Court or the trial court. Finally, a failure to "pursue" pre-trial motions does not rise to the level of inadequate assistance. Even assuming for the purposes of this motion that all the allegations are true, petitioner has not demonstrated that his trial was a farce or a mockery of justice such as would shock the Court's conscience. Thus, under the applicable principles, the claims must be denied. See *United States v. Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974). Denied.

Decision is reserved on petitioner's application to vacate the judgment of conviction and for an opportunity to amend this petition. The Court presumes that the United States Attorney is aware of his responsibilities in this case as set forth in Formal Opinion 280 of the A.B.A., which requires an attorney to advise the Court of decisions adverse to his position which his opponent has not raised—and that he will comply therewith. Thus, the application for an order directing compliance is denied.

Petitioner's request for a photocopy of all authorities published prior to 1972 which will be cited by the government in its reply papers is hereby granted. The government is directed to append to the petitioner's copy of its anticipated memorandum in opposition a photocopy of any decision cited which was published prior to 1972.

The government is directed to file papers in opposition to items II, III, and IX of the petition within thirty days hereof.

SO ORDERED.

Dated: New York, New York
December 13, 1976

/s/ L. W. PIERCE
LAWRENCE W. PIERCE
U. S. D. J.

Memorandum Order, Dated April 22, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
76 Civ 4980
(Pro Se)

MICHAEL HALSEY BROWN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

This is a petition brought pursuant to 28 U.S.C. § 2255. On December 13, 1976, this Court dismissed seven of the ten claims contained in the petition, and directed the government to respond to the three claims remaining. The government filed its opposition papers on January 14, 1977, and petitioner Brown filed his reply on March 8, 1977. The Court's rulings on the three claims are as follows:

Alleged Use of Mail at Trial

Brown claims that during his pre-trial incarceration, agents of the government opened his mail and thereby uncovered evidence which was subsequently used against him at trial. Brown claims that this violated his eighth amendment rights.¹

¹ Petitioner Brown was held on \$100,000 bail following his arrest and that bail was never reduced. Such bail was clearly not excessive in light of the charges against the petitioner. See *Bowers v. Coiner*, 309 F.Supp. 1064 (S.D. W.Va. 1970). In any event, the Court does not find that the amount of bail set prior to trial, regardless of its amount, could have any effect upon the validity of the judgment of conviction in this case. Accordingly, with respect to the eighth amendment argument, the Court "can find no basis in fact or law" for the claim. *Bowers v. Coiner*, *supra*, 309 F.Supp. at 1074.

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The government suggests that Brown is actually seeking to raise a fourth amendment claim concerning the opening of his mail. Petitioner's reply papers appear to support this contention. However, the affidavit of the prosecutor establishes that no letters were ever employed at the trial of this action; further, it would appear that Brown was aware of this alleged search and seizure and that he chose not to raise the issue at trial or on his direct appeal. Thus, there has been a "deliberate bypass" and petitioner is now foreclosed from asserting the search and seizure claim. See *Williams v. United States*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972).

The government further asserts that Brown is foreclosed from raising this claim by the recent decision of the Supreme Court in *Stone v. Powell*, 44 U.S.L.W. 5313 (U.S. July 6, 1976). However, in light of the ongoing discussion concerning the reach of that decision, see *Gates v. Henderson*, No. 76-2065 (2d Cir. Jan. 12, 1977), the Court declines to reach the question of whether the rule of *Stone v. Powell* should be extended to include habeas corpus claims made by federal as well as by state prisoners.

Brown asserts that he did not have an adequate opportunity to raise the search and seizure issue at trial or on appeal; in support of this claim, he alleges simply that his lawyers did not know about the search. However, counsel cannot be expected to read the petitioner's mind; the failure to raise the issue was petitioner's, not that of his counsel. Accordingly, the Court concludes that the fourth amendment issue has been waived and that the claim must accordingly be dismissed. *Williams v. United States*, *supra*.

*Memorandum Order**Jury Selection*

Brown claims that his conviction must be vacated since the Jury Selection Plan for the Southern District of New York excludes transients and felons from service upon grand and petit juries. The argument is without merit. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *United States v. Owen*, 492 F.2d 1100, 1109 (5th Cir. 1974); *United States v. Arnett*, 342 F.Supp. 1255, 1261 (D. Mass. 1970) (Wyzanski, J.). Thus, the jury selection claim must be dismissed.

Claim of Perjured Testimony

Brown claims that four government witnesses lied on the stand in his case. First, he claims that two persons, Larry and William Stafford, lied when they stated that they had been made no promises in exchange for their testimony. At the time of the trial, the Stafford brothers were charged with criminal offenses for which they subsequently pleaded guilty. Brown claims that their testimony gave the jury the impression that they would be going to jail, while they in fact thereafter received sentences of probation. The mere allegations of the petition do not, on their face, constitute a claim of perjury. The bare fact that the Staffords received probationary terms does not establish that any promises existed or that the Staffords knew, at the time they testified, that probation would be the outcome. Nor does Brown allege that the prosecutor knew that the testimony was perjurious, if indeed it was. See *Hallman v. United States*, 490 F.2d 1088 (8th Cir. 1973); see also *United States v. Stofsky*, 527 F.2d 237, 245-47 (2d Cir. 1975).

The same infirmities are present in Brown's claim that two government agents committed perjury. Brown claims that the agents lied when they attributed to Brown

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certain statements concerning communists in New York, and concerning certain ingredients for explosives. The barefaced denial of these statements by the petitioner is not a sufficient factual showing to establish that the agent's statements were indeed perjurious. Further, there is no allegation that the prosecutor was aware of the alleged perjury, if indeed any existed. See *Romano v. United States*, 460 F.2d 1198 (2d Cir. 1972) (*per curiam*); *United States v. Gonzales*, 33 F.R.D. 280 (S.D. N.Y. 1960), *aff'd*, 321 F.2d 638 (2d Cir. 1963).

For the foregoing reasons, the petition for a writ of habeas corpus is hereby denied in all respects.

So ORDERED.

Dated: New York, New York
April 22, 1977

/s/ L. W. PIERCE
LAWRENCE W. PIERCE
U. S. D. J.

★ U. S. Government Printing Office 1977—

714—059—672

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Jeremy G. Epstein being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

(two) That on the *21* day of *October*, *1977*
he served *2* copies of the within *brief*
by placing the same in a properly postpaid franked
envelope addressed:

Michael H. Brown
Reg. No. 81856
P.O. Box 33
Terre Haute, Indiana

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing in the United States Courthouse Annex,
One St. Andrew's Plaza, Borough of Manhattan, City
of New York.

Jeremy G. Epstein

Sworn to before me this

day of *October*, *1977*

Jeannette Ann Grayeb
JEANNETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979